From: Fordham.Tami@epamail.epa.gov
To: Jen.Mark@epamail.epa.gov
Date: 1/10/2013 3:02:50 PM
Subject: Update for Donlin?
Attachments: FACT SHEET_EPA ROLES & RESPONSIBILITIES_draft FINAL.pdf

Hi Mark,
What do you think about revising this to fit Donlin? Would be nice to have something to point to or share with tribes if they ask. Would need to add the PSD piece, haven't really thought about what other pieces yet. I don't think there would be any site specific criteria issues under APDES/NPDES so we would need to take that out. Although we are still early in the process, so I suppose things could change.

We should talk about this sometime . . . soon as it may be prove quite helpful.

Before I go (on week 2) we should chat to see what messages I may need to bring with me, in the event I get any questions that need responding.

Thanks! Tami

(See attached file: FACT SHEET_EPA ROLES & RESPONSIBILITIES_draft FINAL.pdf)

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This document outlines the Environmental Protection Agency's (EPA) potential regulatory roles and responsibilities related to the proposed Chuitna Coal Project.

EPA's Roles and Responsibilities

Clean Water Act

Section 402 (NPDES) Oversight

Section 402 of the Clean Water Act (CWA) established the National Pollutant Discharge Elimination System (NPDES), the national permitting program for the discharge of pollutants into waters of the United States (U.S.). Section 402(b) of the CWA provides that individual states wishing to implement the NPDES program for discharges into state waters can apply to the EPA for the development and implementation of a state-run NPDES program. States must demonstrate that their proposed program meets nine criteria set forth in CWA 402(b) prior to EPA approval. Proposed state programs meeting the nine criteria established in 402(b) will be approved by the EPA.

On October 31, 2008, the EPA approved the State of Alaska's application to administer the NPDES program, with the Alaska Department of Environmental Conservation (ADEC) being charged with implementation of the program. In its application, the State of Alaska requested that it assume authority for the NPDES program in phases. On October 31, 2010, the State of Alaska assumed NPDES permitting authority for the mining sector in Alaska, including the proposed Chuitna Coal Project.

While states and tribes with approved programs have the authority to issue and enforce NPDES permits within their jurisdictions, the EPA retains ultimate authority and jurisdiction for oversight of state and tribal programs and ensuring all NPDES permits meet the minimum requirements of the CWA and implementing regulations. Under the oversight enforcement authority provided in the CWA, the EPA can review any proposed or draft state NPDES permits and may raise objections if permit provisions do not meet the requirements of the CWA or implementing regulations. The EPA will work closely with the state and provide recommendations and actions that must be taken to resolve the objection. If the objection to the proposed state or tribal permit is not resolved, the EPA will assume issuance, compliance, and enforcement authority for that permit.

As discussed in previous meetings and correspondence, the EPA Region 10 has committed to review any proposed NPDES permits for the Chuitna Coal Project, and ensure its provisions meet the minimum requirements of the CWA and implementing regulations. As a state action, primary consultation and coordination on any proposed NPDES permits must occur directly between the NVT and the State of Alaska.

Section 404 (Wetlands and other Aquatic Resources) Oversight

Section 404 of the CWA established the national regulatory program for the discharge of dredged or fill material into navigable waters of the U.S., including wetlands. Activities in waters of the U.S. regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the U.S., unless the activity is exempt from Section 404 regulations (e.g. certain farming and forestry activities). The basic premise of the 404 program is that no discharge of dredged or fill material may be permitted if: 1) a practicable alternative exists that is less damaging to the aquatic environment, or; 2) the nations waters would be significantly degraded.

The U.S. Army Corps of Engineers (Corps) is responsible for administering the day-to-day activities of the 404 program, including reviewing applications and making permit decisions, conducting or verifying jurisdictional determinations, developing policy and guidance, and enforcing the provisions of Section 404. The EPA has various roles in the 404 program including: 1) developing policy, guidance, and environmental criteria used in evaluating permit applications; 2) determining the scope of geographic jurisdiction and applicability of exemptions; 3) approving and overseeing state and tribal assumption of the 404 program; 4) reviewing and commenting on individual permit applications; 5) prohibiting, denying, or restricting the use of any defined area as a disposal site (i.e., 404(c) veto); 6) elevating specific cases (i.e., 404(q)) and; 7) enforcing 404 provisions.

There are two types of permits for proposed activities regulated under Section 404 of the CWA—*individual permits* and *general permits.* Individual permits are issued for specific projects which may result in significant adverse impacts to the aquatic environment. Individual permits can be issued as a standard permit or *letter or permission,* which involves a more limited review for projects with minor impacts. General permits are issued for certain categories of projects which are substantially similar in nature and only involve mininal adverse impacts. Due to the significance of impacts, large-scale resource extraction projects typically require individual permits, while general permits are typically issued for projects such as minor road construction activities, utility line backfilling, etc. General permits may cover activities at the national, regional or local level (e.g., Nationwide Permit 12 for utility line activities throughout the U.S.), while individual permits are typically for activities associated with a specific project (e.g., construction of a gravel pad in wetlands for a specific oil and gas operation).

Permits issued under the 404 program are subject to the environmental criteria established by the EPA in the CWA Section 404(b)(1) Guidelines[1]. Section 230.10 of the EPA Guidelines establishes four basic requirements that must be met in order for the Corps to issue a permit. If any one of the requirements is not met, a permit cannot be issued. The four basic requirements of the Guidelines include:

1. No Practicable Alternative. There must be no practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequence.

[1] http://www.epa.gov/owow/wetlands/pdf/40cfrPart230.pdf

2. No Violation of Other Laws. The project cannot be permitted if it: 1) causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard; 2) violates any applicable toxic effluent standard or prohibition under section 307 of the Act; 3) jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act ... or results in the destruction or adverse modification of ... critical habitat; or 4) violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary....
3. No Significant Degradation. The project must not cause or contribute to significant degradation of the waters of the U.S. This section of the 404(b)(1) Guidelines lists criteria to be considered in making a determination of significant degradation. It requires this determination to be based on appropriate factual determinations, evaluations, and tests.
4. Minimizing Adverse Impacts. The project must include appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic ecosystem.

In 1990 the EPA and the Corps entered into a memorandum of agreement (MOA) outlining the policy and procedures to be used in determining the type and level of mitigation necessary to ensure compliance with the 404(b)(1) Guidelines. In 2008 the EPA and the Corps expanded the Guidelines to include additional requirements and guidance for compensatory mitigation to offset unavoidable impacts to wetlands and aquatic resources that cannot otherwise be avoided or minimized. The basic premise of the compensatory mitigation requirement is no net loss of wetlands overall, meaning that wetland losses which cannot be avoided or minimized must be replaced at a minimum of 1:1 ratio on a nationwide basis.

The EPA's 404 program staff review selected individual permit applications submitted to the Corps during the public notice and comment period on the application. If the EPA determines that the proposed project is not meeting the 404(b)(1) Guidelines, the EPA works with the Corps, other agencies, and the applicant to bring the project into compliance with the Guidelines. If the project, even with extensive modifications, does not comply with the guidelines, the Corps cannot authorize it. In addition to the EPA, the U.S. Fish and Wildlife Service (USFWS) also has a commenting role during the permit application review process. Inter-agency disputes and elevation of permitting issues are governed by the Section 404(q) Dispute Resolution Process established in various MOA's between the EPA, Corps, USFWS, and National Marine Fisheries Service. Section 404(c) authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material if the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fisheries areas, wildlife, or recreational areas. The EPA has used its 404(c) "veto authority" only 13 times since 1972, out of an average of 60,000 Corps permit actions each year.

Additional information on the 404 process can be found on the EPA's 404 website[2], as well as various approved fact sheets on the general 404 process[3], 404(q) Dispute Resolution Process[4], and 404(c) veto authority[5].

[2] http://water.epa.gov/lawsregs/lawsguidance/cwa/wetlands/index.cfm
[3] http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf
[4] http://water.epa.gov/type/wetlands/outreach/upload/404q.pdf
[5] http://water.epa.gov/lawsregs/guidance/cwa/dredgdis/upload/404c.pdf

EPA's role in the 404 process for the Chuitna Coal Project will be to: 1) continue to work with the Corps, project applicant, and other agencies in the pre-application process, ensuring the best available science is used in the 404 process; 2) review and comment on any public notice for permit application; 3) ensure the project and permit meet the requirements of the 404(b)(1) Guidelines, the CWA, and implementing regulations. Because the Corps is the lead agency for 404 permitting, primary consultation and coordination on any proposed 404 permits must occur directly between the NVT and Corps.

Section 303 (Water Quality Standards)

There are two primary mechanisms for the control of point source pollution under the CWA—*technology-based effluent limitations* and *water quality standards.* Technology-based effluent limitations are established nationally by the EPA and represent the minimum level of pollution control that all sources must meet based on pollution prevention or treatment technologies available. These minimum technology-based standards are established without considering the water quality goals or site specific conditions of the receiving water.

Water quality standards (WQS) define the goals for a waterbody by designating its uses (e.g., recreation, aquatic life protection, public water supply, etc), setting narrative or numeric criteria to protect those uses (e.g., *no toxics in toxic amounts*, 3.2 µg Cu/L), and establishing provisions such as antidegredation and mixing zone policies to protect waterbodies from pollutants. States, territories, and authorized tribes are required under the CWA to establish WQS for their waters. Where the minimum technology-based effluent limitations are insufficient to achieve or protect the designated uses established for a waterbody, the WQS serve as the bases for defining where additional pollution controls are needed to meet the water quality goals of the state, territory, or authorized tribe.

The EPA is required to review all proposed state, territory, or authorized tribal WQS—including revisions to previously approved standards—to determine if they meet the requirements of the CWA and implementing regulations. Proposed standards which meet these requirements are approved for use in implementing the CWA within the waters to which they apply.

The State of Alaska has EPA-approved WQS for all surface waters within the state of Alaska. These WQS include designated uses, narrative and numeric criteria to protect those uses, and other provisions for antidegredation and mixing zone policies. Any revisions or amendments to Alaska's current WQS—including the adoption of site-specific criteria, change in established designated uses, adoption of new or revised numeric or narrative criteria or change in mixing zone policies—must go through a public review and comment process, be adopted by the State into their regulations, and be reviewed by the EPA for consistency with the CWA and implementing regulations.

Alaska's WQS contain a provision that allows for the establishment of site-specific water quality criteria under specified conditions (18 AAC 70.235)[6]. Site-specific water quality criteria modify otherwise applicable state-wide criteria to be more or less stringent, based upon site-specific conditions affecting the level of controls needed to

[6] http://dec.alaska.gov/water/wqsar/wqs/pdfs/18_AAC_70%20_Amended_September_19_2009.pdf

protect the designated uses in a specific waterbody. There are several ways to develop site specific criteria, but typically a large amount of baseline monitoring and scientific analysis is required to determine the level of protection necessary to ensure the achievement or protection of a particular waterbody's designated uses. Individuals can apply for the development of site-specific criteria by performing the necessary monitoring and analysis and submitting the appropriate documentation to the State. Alternatively, the State can develop site-specific criteria under its own initiative.

Adoption of a site-specific criteria or a change in the designated use of a waterbody is considered a revision to Alaska's WQS and subject to a State public rule-making process, complete with a public review and comment period. Once the State has completed its public review process it must adopt the revision into the State regulations and submit the WQS revision to the EPA for review. The revised criteria may not be used by the State of Alaska until it is approved by the EPA.

The Chuitna watershed has naturally occurring concentrations of some metals which are higher than the numeric criteria established in Alaska's WQS. As a result, the proponents of the Chuitna Coal Project have been exploring options for revising a few of the metals criteria applicable to the Chuitna watershed. Any revised criteria must be scientifically defensible and shown to be protective of the aquatic life and other uses that currently exist in the watershed. As with any revision to Alaska's WQS, adoption of site specific metals criteria or change in designated uses of the Chuitna watershed would be subject to a public review and comment process and, ultimately, approval from the EPA. As a State action, primary consultation and coordination on any proposed revisions to Alaska's WQS must occur directly between the NVT and State of Alaska.

National Environmental Policy Act

Clean Air Act Section 309—NEPA Review

Under Section 309 of the Clean Air Act the EPA is required to review and publicly comment on the environmental impacts of major Federal actions, including actions which are the subject of draft and final Environmental Impact Statements (EISs) under the National Environmental Policy Act (NEPA), proposed environmental regulations, and other proposed major actions. If the EPA determines that the action is environmentally unsatisfactory, it is required by Section 309 to refer the matter to the President's Council on Environmental Quality (CEQ). The most common form of 309 review is the review of EIS's prepared by other Federal agencies pursuant to NEPA. The EPA's Section 309 responsibilities are carried out according to the October 3, 1984 manual, "Policy and Procedures for the Review of Federal Actions Impacting the Environment."[7]

During the 309 process the EPA reviews and comments on the adequacy of the environmental analysis presented in the draft and final EIS, as well as the environmental impacts of the proposed action itself. In addition to written comments, the EPA has also established a two-part rating system for the draft EIS, with one aspect rating the environmental impacts of the project and the other rating the technical adequacy of the analysis used to make impact determinations. There are four ratings for the level of environmental impacts—Lack of Objections (LO), Environmental Concern (EC), Environmental Objection (EO), and Environmentally

[7] http://www.epa.gov/compliance/resources/policies/nepa/nepa_policies_procedures.pdf

Unsatisfactory (EO)—and three levels of rating for the adequacy of the document—Adequate (1), Insufficient Information (2), and Inadequate (3). The rating criteria for environmental impacts and document adequacy are summarized below.

Impact of Action

Lack of Objections (LO): The review has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposed action.

Environmental Concerns (EC): The review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact.

Environmental Objections (EO): The review has identified significant environmental impacts that should be avoided in order to adequately protect the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). The basis for Environmental Objections can include situations:

1. Where an action might violate or be inconsistent with the achievement or maintenance of a national environmental standard;
2. Where the Federal agency violates its own substantive environmental requirements that relate to EPA's area of jurisdiction or expertise;
3. Where there is a violation of an EPA policy declaration;
4. Where there are no applicable standards or where applicable standards will not be violated but there is potential for significant environmental degradation that could be corrected by project modifications or other feasible alternatives; or
5. Where proceeding with the proposed action would set a precedent for future actions that collectively could result in significant environmental impacts.

Environmentally Unsatisfactory (EU): The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed. The basis for an Environmentally Unsatisfactory determination consists of identification of environmentally objectionable impacts as defied above, and one or more of the following conditions:

1. The potential violation of or inconsistency with a national environmental standards is substantive and/or will occur on a long-term basis;
2. There are no applicable standards but the severity, duration, or geographical scope of the impacts associated with the proposed action warrant special attention; or
3. The potential environmental impacts resulting from the proposed action are of national importance because of the threat to national environmental resources or to environmental policies.

Adequacy of Impact Statement

Adequate (1): The draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Insufficient Information (2): The draft EIS does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the proposal. The identified additional information, data, analyses, or discussion should be included in the final EIS.

Inadequate (3): The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purpose of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

The EPA develops written comments and assigns a two-part rating at the draft stage of the EIS. The final EIS is not assigned an additional rating, but the EPA can submit written comments. Adverse ratings such as EU-3 are subject to review by EPA's Office of Federal Activities prior to finalization. In addition, the CEQ is always informed of an adverse rating. If the EPA determines the subsequent final EIS is still unsatisfactory, the Region recommends to the EPA Administrator that the action be referred to the CEQ for resolution.

NEPA Cooperating Agency

Under NEPA, Federal agencies can cooperate on the development of a NEPA analysis when more than one agency has jurisdiction over an aspect of the proposal or special expertise of an environmental issue. Under these circumstances, a lead agency is designated to supervise the preparation of the NEPA analysis, with other cooperating agencies assisting the lead agency in the development of the analysis.

The EPA has accepted the Corps' offer to participate in the development of the Chuitna Coal Project Supplemental Environmental Impact Statement as a cooperating agency due to our special expertise in the development of EIS's for large resource extraction projects in Alaska. As a cooperating agency, the EPA is responsible for assisting the Corps in the development of the SEIS.